In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-798

GEORGE E. STRIPLING, ET AL., PETITIONERS

v.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case involves the desegregation of the public schools of Jefferson County, Alabama. Petitioners are parents of white children attending the Jefferson County School System who filed a separate cause of action in state court naming the Jefferson County Board of Education as defendant and alleging that pursuant to Act No. 1418 (Regular Session, Legislature of Alabama, 1971), petitioners were entitled to have their children enrolled at schools other than the schools to which they were assigned under the plan of desegregation ordered by the United States District Court. The state court issued temporary injunctions directing the Jefferson County School System to enroll petitioners' children at the school they desired to

402-725—73——1

attend. On November 1, 1971, the injunctions were made permanent and the state court held Act No. 1418 to be constitutional.

Upon motion by the plaintiffs in the present case, on October 29, 1971, the district court entered an order directing the parties to the state court litigation to show cause why the state proceedings should not be enjoined pursuant to 28 U.S.C. 2283. On December 3, 1971, the district court below enjoined petitioners "from enforcing, seeking to enforce, or relying upon, Alabama Act No. 1418, and from further prosecuting, defending or otherwise being bound by" the the state court cases and declared Act No. 1418 unconstitutional (App. 17–18, *infra*).[1]

The court of appeals summarily affirmed on September 7, 1972.

The district court found that Act No. 1418

> on its face gives parents the absolute right to require school boards to assign their children to schools other than those prescribed under a desegregation plan [and] is but a "freedom-of-choice" option dressed in slightly different clothing. [App. 14, *infra*.]

Since the district court further found that the state court injunctions issued pursuant to Act No. 1418 interfered with the orderly implementation of the court-ordered plan of desegregation, the district court had authority to protect the Board of Education from

[1] Petitioners' appendix does not contain the entire text of the December 3, 1971, opinion and order of the district court. Since portions of the opinion not included may be relevant to the issues before this Court, we have reprinted the entire opinion and order as an Appendix to this memorandum.

COPY BOUND

the inconsistent state court orders and to take steps necessary to effectuate its own judgments. 28 U.S.C. 2283; *Lockett* v. *Board of Education of Muscogee County School District*, 447 F. 2d 472, 473 (C.A. 5). See also *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220; *National Labor Relations Board* v. *Nash-Finch Co.*, 404 U.S. 138; *Sheridan* v. *Garrison*, 415 F. 2d 699 (C.A. 5); *Baines* v. *City of Danville*, 337 F. 2d 579, 593 (C.A. 4).

It was unnecessary to impanel a three-judge court to determine the constitutionality of the Act since the courts below found that the Act, by its terms, would allow parents to negate the attendance patterns established and approved by the district court to disestablish the dual school system of Jefferson County and that the Act was therefore contrary to *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45. *Bailey* v. *Patterson*, 369 U.S. 31, 33; *Alabama ACLU* v. *Wallace*, 456 F. 2d 1069 (C.A. 5); *Bush* v. *Orleans Parish School Board*, 138 F. Supp. 336 (E.D. La.); *State of Alabama* v. *United States*, 314 F. Supp. 1319, 1322-1323 (S.D. Ala.).

Since the courts below applied well settled legal principles to the facts of this case, further review is not warranted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DAVID L. NORMAN,
Assistant Attorney General.

JANUARY 1973.



APPENDIX

United States District Court, Northern District of Alabama, Southern Division

Civil Action No. 65-396

[Filed, December 3, 1971]

LINDA STOUT, ET AL., PLAINTIFFS

vs.

JEFFERSON COUNTY BOARD OF EDUCATION, ET AL., DEFENDANTS

Memorandum of Opinion and Order

This proceeding, ancillary to the Jefferson County school desegregation case which has been pending in this court and federal appellate courts since 1965, involves the effect of recent actions of Alabama's legislative, executive and judicial branches upon a portion of the desegregation plan ordered by this court. The procedural questions presented in the proceeding make appropriate a brief chronology of the events leading to this order:

> April 20, 1971. Decisions of the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1; *Davis* v. *School Comm'rs of Mobile County*, 402 U.S. 33; and *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43.

July 16, 1971. Decision of Fifth Circuit Court of Appeals in *Stout v. Jefferson County Board of Education,* No. 29886 and 30387. The Jefferson County school case was remanded to the district court with instructions, *inter alia,* to require the Jefferson County Board of Education (hereafter "the Board") to implement a student assignment plan for 1971–72 in conformity with the principles enunciated in *Swann.*

August 12, 1971. Board's plan filed in district court. This plan divided the county into mandatory, contiguous attendance zones, with no provisions for transfers other than under the standing majority-to-minority rule previously made applicable in Jefferson County.

September 8, 1971. Plan for desegregation of schools for 1971–72 approved by district court. This plan, adopted after a hearing, involved various changes from the Board's proposal, but was still grounded on the division of the County into mandatory, generally contiguous, attendance zones. Attendance at schools other than in the zone of the student's actual residence was prohibited with certain specified exceptions.[1]

September 23, 1971. "Anti-busing law," Act. No. 1418, Regular Session of Alabama Legislature, signed into law by Governor. According to this statute, "No student shall be denied admission to any public school in this state when, in the determination of such child's parents or legal

[1] The order of September 8th, together with the orders of August 24 and 25, 1971, which it amended, has been appealed to the Fifth Circuit Court of Appeals in certain particulars. So far as can be determined, none of the appeals or cross- appeals attacks the proscriptions against transfers for reasons other than those permitted by the order, or attacks any of the four attendance zones here involved (with the exception that plaintiffs seek a mid-year pairing of the Moton and Leeds schools).

COPY BOUND T

guardian, the time or distance of travel to another school is so great as to risk the health or safety of the child or significantly impinge on the educational process. Upon a determination being made at the time or distance of travel to another school is so great as to risk the health or safety of the child or significantly impinge on the educational process, the parent or guardian shall make written application to the authorities of the school to which the child is to be admitted, and the school authorities shall thereupon admit said child."

October 1–8, 1971. Applications made to school authorities by parents of Owens, Caldwell and McDaniel children that they be permitted to attend Leeds E.S. (rather than Moton, the school in their attendance zone under the court order) and by the parent of the Stripling child that she be permitted to attend Concord E.S. (rather than Zinnerman, the school in her attendance zone under the court order). (Moton and Zinnerman were formerly all black schools; the children here involved are white.)

October 18, 1971. (1) Complaints filed in the Circuit Court for Jefferson County by parents of above indicated children against the Board and the principals at Leeds and Concord. The complaints alleged that (a) the children were assigned to Moton and Zinnerman schools by the federal court order, (b) Act No. 1418 had been subsequently enacted, (c) they had as parents made determinations under the Act that the children should be assigned to Leeds and Concord (and stating their reasons for such determinations), and (d) the school authorities had not granted their applications for such reassignments. They asked that the school authorities be ordered to permit such reassignments under Act No. 1418. (2) Temporary injunc-

O CLOSE IN CENTER

tions issued *ex parte* by the state court requiring school authorities to enroll the students at Leeds and Concord. (3) Petition filed in federal district court in 65–396 by United States (an existing plaintiff by intervention), asking that the injunctions issued by the state court be vacated and such causes be removed to the federal court.

October 20, 1971. Answers filed in state court by school authorities, (a) admitting the attendance zones for the students under the federal court order, (b) admitting passage of Act No. 1418, (c) demanding proof of allegations regarding the parents' determinations under Act No. 1418, and (d) stating that, pursuant to the temporary injunction, they had approved the prior applications for transfer.[2]

October 26, 1971. Petition filed in federal district court (65–396) by plaintiffs therein, asking that Act No. 1418 be declared unconstitutional and that the Board be directed to reassign the students to the schools located in the zones of their respective residences.

October 29, 1971. (1) Amended answers filed in state court by school authorities, asking for declaratory judgment whether Act No. 1418 is valid and constitutional. (2) Order by federal district court (65–396) directed to parties in state court actions that they show cause, if any, why the district court under 28 U.S.C. § 2283 should not stay the state court proceedings and enjoin such parties not to pursue or be bound by such actions.

November 1, 1971. Final decrees entered in state court, declaring Act No. 1418 constitutional and viable in Jefferson County, and making permanent the temporary injunctions. These decrees were rendered on the bills of complaint

[2] The answers indicate that copies of the transfer applications were being attached thereto. However, the state court files do not contain any such applications.

COPY BOUND T

and the answers as amended, without taking any evidence.[3]

November 5, 1971. Petition in Fifth Circuit Court of Appeals by state court plaintiffs, asking that the proceedings in the federal district court be halted or that a three-judge panel be convened under 28 U.S.C. § 2281.

November 12, 1971. Order of Fifth Circuit, denying state court plaintiffs' petition.

November 15, 1971. Responses filed in federal district court by parties to state court actions. State court plaintiffs recite the actions in the state court and assert them to be "res judicata" to federal court proceedings. State court defendants (school authorities) challenge any "removal" of state court proceedings since not sought by a party to such proceedings, assert that federal injunctive relief would be an unwarranted conflict with state judicial proceedings inasmuch as there are [or were until the time expired] rights of removal, and contend that the actions taken on these transfers pursuant to the state court decrees are not in conflict with the desegregation plan ordered by the federal court.

November 24, 1971. Notice given by federal district court to Governor and Attorney General of Alabama that a ruling would be deferred until December 3, 1971, to permit filing of briefs or memoranda in support of the constitutionality of Act No. 1418. (Briefs have not been filed.)

---

[3] The state court described the bills of complaint as verified or sworn. However, it would appear that, under the highly technical rules of pleading in Alabama, the type of affidavit used on the complaints would have been held, on proper objection, as "amount[ing] to nothing." See *Board of Water & Sewer Comm'rs* v. *Springgs*, 274 Ala. 155, 146 So. 2d 872 (1962).

492-725—73——2

DO CLOSE IN CENTER BLURRED COPY

I. Status of Proceedings (suit held not removed)

Some confusion has arisen regarding whether or not the state court proceedings have been removed to the federal court. The only petition filed in this court asking for removal has been that of the United States, not a party to the state court proceedings. As the statutory procedures for removal, 28 U.S.C. §§ 1441-51, are available only to parties defendant, 7B Moore's Federal Practice, JC–671, 704, it is clear that the filing by the United States of its petition did not *ipso facto* effect a removal. It may be, as argued by the United States (citing as authority the unreported Louisiana Western Division case of *Graham* v. *Evangeline Parish School Board*), that under the Supremacy Clause of the Constitution there exists an inherent non-statutory power in the federal court to direct removal of state court actions which can be exercised under the All Writs Statute, 28 U.S.C. § 1651(a). Suffice it to say, this court, having serious doubts about such a power, has declined the government's invitation to issue such an order, preferring instead to proceed under the well-established injunctive powers available under the All Writs Statute. Accordingly, the state court proceedings are not to be treated as removed to the federal forum as such.

II. Injunction Under 28 U.S.C. § 2283

The Board, as part of its answer to the show cause order, has asserted that there is no conflict between the actions taken under the state court decrees and the provisions of the federal court order. If true, this would appear to preclude issuance of an injunction by the federal court since not "necessary in aid of its jurisdiction, or to protect or effectuate its judgment." 28 U.S.C. § 2283.

COPY BOUND

In support of this contention the Board states that, even with the five transfers directed by the state court, it is still within the limits allowed in the federal court order for hardship transfers. This court, in its order of September 8, 1971, had granted the Board:[4]

> the right to grant intra-system transfers to students on the basis of exceptional and compelling hardship unique to the student or the student's family. In no year may transfers under this provision be granted to more than ½ of one percent (.5%) of the total number of students in the system. Such transfers shall be made on a non-discriminatory basis for non-racial reasons and must be supported by detailed documentation of the reasons for the transfer. (Paragraph IV(e).)

The Board's argument is faulty in two respects. First, the concept of the federal court order in this regard was to give to the *Board* a limited discretionary power to treat the most meritorious of problems caused by mandatory attendance zones—the effect of Alabama's Anti-busing Statute and of the state court decisions enforcing it is to withdraw this discretion from the Board and give it to parents, presumably on a first-come first-served basis if subject to any limitations. Secondly, it is clear from a reading of the state court complaints that, with the possible exception of the Stripling child (a particular health problem), the grounds stated for the transfer request were hardly

[4] By order of October 29, 1971, following a hearing which reflected that many transfers had been granted by the Board for other than exceptional, compelling and unique reasons adequately documented, this court transferred such discretionary powers, commencing with the Spring 1972 semester, to an independent five member committee appointed by the court.

"exceptional and compelling"[5] and certainly not "unique."

Moreover, the state court decrees, to which the Board was a party, held the Anti-busing Statute to be constitutional and applicable in the Jefferson County school system. Such a holding quite clearly comes in direct conflict with the provisions of the desegregation plan ordered by this court.

In summary, the provisions of 28 U.S.C. § 2283 do not constitute a bar to the granting of injunctive relief by this court.

III. Three-Judge Court Unnecessary

Proceedings to enjoin the operation of state statutes for conflict with the national Constitution typically require the empanelling of a three-judge court. 28 U.S.C. §§ 2281, 2284. This procedure is not, however, required when, as here, prior decisions make frivolous any claim that the state statute on its face is not unconstitutional. *Bailey* v. *Patterson,* 369 U.S. 31, 33 (1962). Such a panel was held to be unnecessary in a recent decision invalidating an earlier, but similar, Alabama "freedom-of-choice" statute:

> The settled state of the law convinces us that there is no substantial federal question pre-

[5] The additional one-way distance for four of the children is 2 miles, with the assertion that this adds 20 minutes of travel time; as to the fifth child the claim is that there is an additional one-way distance of 4½ miles, adding 25 to 30 minutes of time each way. The Supreme Court in *Swann* approved a plan which involved adding an average of 7 miles distance, with as much as 35 minutes additional time, to the time and distance involved in attending the school nearest the students' homes. The Fifth Circuit, in a post-*Swann*-decision, has labelled increases of 1½ to 4 miles each way as "relatively short." *United States* v. *St. Johns County School District,* —— F. 2d —— (July 15, 1971; No. 30413).

BLURRED COPY

COPY BOUND

> sented in this case. Where * * * the subject Act conflicts with an order of a federal court drawing its authority from the Fourteenth Amendment, the Act is unconstitutional and must fail. The supremacy clause of our compact of government will admit to no other result. *State of Alabama* v. *United States,* 314 F. Supp. 1319, 1323 (S.D. Ala. 1970).[6]

Also see the cogent opinion by Judge Lawrence in *Stell* v. *Savannah-Chatham Board,* —— F. Supp. —— (S.D. Ga. 1971) (November 19, 1971; No. 1316) (holding unconstitutional a recent freedom-of-choice statute passed by the Georgia Legislature).

Given the consistent record of past Alabama school statutes in the federal forum, which need not be recited here, one may wonder why still another should wind its way through the legislative processes at this late date. The answer lies in the rather disingenious extraction of one sentence from the *Swann* decision and its remolding into statutory form. The sentence in question is the following:

> An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process. 402 U.S. at 30–31.

The distortion comes from conveniently overlooking that this "objection" was not set up as one of controlling significance to be applied by parents, but rather one of a number of factors to be considered in the adoption of an overall attendance plan initially by a school board and subsequently by the federal court. As previously indicated, footnote 5 *supra,* the Charlotte-Mecklenburg plan approved by the Supreme

---

[6] Also see footnote 17, 314 F. Supp. at 1323. The case *sub judice* involves a proceeding against county school authorities.

DO CLOSE IN CENTER

Court in *Swann* involved student assignments which, on the average, added 7 miles distance beyond the "neighborhood" school, the Court remarking that "desegregation plans cannot be limited to the walk-in school." 402 U.S. at 30.

On analysis, the new Alabama statute, which on its face [7] gives parents the absolute right to require school boards to assign their children to schools other than those prescribed under a desegregation plan, is but a "freedom-of-choice" option dressed in slightly different clothing. Such options have been previously ruled out for the Jefferson County school system, at least until a unitary system has been in operation for a sufficient length of time to escape the tendency such option would have towards reestablishing a dual system.[8] *United States* v. *Jefferson County Board*, 417

---

[7] The state court decisions purport to find not only that the parents made a "determination" under Act No. 1418, but also that various factors listed as grounds therefor were true. Nothing in the statute would require such an evaluation, and in the cases before the state court such findings were made without any evidence being offered even though such matters were not admitted in the pleadings. See footnote 3 *supra* regarding the "verification" of the state court complaints.

[8] This is not to say that attendance zone plans must eliminate all choice. Rather, provisions allowing optional "majority-to-minority" transfers are standard in this circuit and were approved in *Swann*. Likewise, another standard provision in this circuit permits transfers between two school systems where the cumulative effect does not in either system reduce desegregation. See *Stout* v. *Jefferson County Board*, *sub nom.*, *Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1218 (5th Cir. 1970). Also see 419 F. 2d 1221 (Bibb County, Georgia, system). The key is that the transfer options must be so conditioned or limited as to avoid any interference with the process of conversion into a unitary system. See *Lemon* v. *Bossier Parish School Board*, —— F. 2d —— (5th Cir. 1971) (August 24, 1971; No. 71-2523): "New sprouts permitting freedom of choice of schools, classes and subjects, which might even remotely tend to perpetuate segregation, must not be allowed to bud."

F. 2d 834 (5th Cir. 1969). *Cf. United States* v. *Jefferson County Board*, 372 F. 2d 836, 889 (5th Cir. 1966), 380 F. 2d 385 (5th Cir. 1967) ("a schoolchild has no inalienable right to choose his school"). Also see *State of Alabama* v. *United States*, 314 F. Supp. 1319 (S.D. Ala. 1970).

The fate of Act No. 1418, if not determined by cases involving earlier Alabama statutes, is clearly fixed by the Supreme Court's decision in *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, issued on the same day as the basic *Swann* decision. There, in a case involving machinations of the three branches of government of North Carolina quite similar to those of Alabama in the present dispute, the Supreme Court invalidated North Carolina's Anti-busing statute. Speaking for a unanimous court, the Chief Justice said:

> [I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees. The legislation before us flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance in the schools. The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the *Swann* case. * * * We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a balance or ratio," will similarly hamper the ability of local authorities to effectively remedy constitutional violations. 402 U.S. at 45–46.

Portions of the opinion of the district court* regarding the North Carolina law are particularly pertinent to Alabama Act No. 1418: "The flaw in this legislation is its rigidity." (312 F. Supp. at 508) "We merely hold today that North Carolina may not validly enact laws that prevent the utilization of any reasonable method otherwise available to establish unitary school systems." (312 F. Supp. at 510). So here, the vesting in parents of absolute rights to negate school assignments made by school authorities operating under the review of the federal courts inescapably operates to obstruct an effective remedy for constitutional violations.

IV. Remedy

The District Court, upon learning that a state court has enjoined a school board from implementing a desegregation plan ordered by the federal courts, is to take immediate action, through use of the injunctive process or otherwise, to the end that the board may implement such plan. *Lockett* v. *Muscogee County Board*, —— F. 2d —— (5th Cir. 1971) (August 30, 1971, No. 71-2490). Also see *North Carolina State Board of Education* v. *Swann*, 402 U.S. at 44, footnote 2.

In the present case the duty is clear in one respect: to declare Alabama Act No. 1418, 1971 Regular Session, unconstitutional, and to direct the Jefferson County school authorities to disregard the provisions of that Act as relates to assignment of students in their system. As to the five students transferred by the state court proceedings under that Act, a some-

*The North Carolina district court concluded that a three-judge panel was necessary. The case *sub judice* comes 20 months and many decisions (including the Supreme Court's *Swann* opinions), later.

what different situation is presented. This court is reluctant to order the re-transfer of such students during the middle of the school semester, with its attendant disruptions, particularly where this court has on another occasion permitted students improperly transferred under the transfer provisions of the court's order to complete the present semester at the transferee school. A similar ruling appears most just in the present case, the court being mindful that the students too frequently find themselves confronted with conflicting directions from the home, the school, and the courts.

V. Order

On the findings and conclusions above indicated, it is hereby ORDERED:

1. That Alabama Act No. 1418, 1971 Regular Session, be, and it hereby is, declared unconstitutional.

2. That for the remainder of the Fall 1971 semester, Susan Stripling shall be permitted to remain as a student at Concord E.S., and Steve Owens, Frances Owens, Robert Allen Caldwell, and Debra Caldwell shall be permitted to remain as students at Leeds E.S. For the Spring 1972 semester such students shall be permitted to attend Jefferson County schools only in strict conformity with the provisions of the "desegregation plan" then in effect for such system under applicable federal court orders, and without regard to the provisions of Alabama Act No. 1418 or to the provisions of the decrees previously entered by the Circuit Court for the Tenth Judicial Circuit of Alabama, in Equity, Cases Nos. 168-139 and 168-140.

3. That Charles Owens, Sinda Lou Owens, Major A. Caldwell, Marvelene Caldwell, Charlie McDaniel, George E. Stripling, the Jefferson County Board of

Education, George M. Rogers, C. R. Bottenfield, W. A. Jenkins, Jr., Mrs. R. W. Gwin, O. W. Gresham, J. Revis Hall, Jessie Kaylor, and Joe Shepherd, and their respective officers, agents, servants, employees, attorneys, and all others in active concert or participation with them who receive actual notice hereof, be, and they hereby are, enjoined from enforcing, seeking to enforce, or relying upon, Alabama Act No. 1418, and from further prosecuting, defending, or otherwise being bound by Cases Nos. 168-139 and 168-140, presently pending in the Circuit Court of the Tenth Judicial Circuit of Alabama in Equity. The provisions of paragraph number 2 above of this order shall constitute an exception to the provisions of this paragraph to the limited extent therein provided.

4. That applications for other relief by the federal court plaintiffs or intervening plaintiff, specifically the award of attorneys fees, is hereby denied.

5. That the attention of all parties is directed to Part III of *Singleton* v. *Jackson Municipal Separate School District,* 419 F. 2d 1211 (5th Cir. 1969), with the change however that three legible copies of all matters pertinent to the issues presented on an appeal are to be filed. No extension from the schedule established in *Singleton* will be allowed except by order of the panel of the Fifth Circuit to which the appeal is assigned.

DONE AND ORDERED this the 3rd day of December, 1971.

SAM C. POINTER, JR.,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1973